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Supreme Court, U. S.

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No. 97 - 6146

**IN THE SUPREME COURT OF THE
UNITED STATES**

October Term, 1996

ANGEL J. MONGE,

Petitioner,

vs.

PEOPLE OF THE STATE OF CALIFORNIA,

Respondent.

**REPLY TO RESPONDENT'S BRIEF IN
OPPOSITION TO PETITION FOR WRIT OF CERTIORARI**

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INTRODUCTION

Pursuant to Rule 15, petitioner Angel Monge hereby submits this Reply to Respondent's Brief in Opposition to Petition for Writ of Certiorari.

ARGUMENT

- I. IN ORDER TO RESOLVE A STARK SPLIT OF AUTHORITY IN THE LOWER COURTS OVER WHETHER DOUBLE JEOPARDY APPLIES TO TRIAL LIKE BUT NON-CAPITAL ENHANCEMENTS, CERTIORARI IS APPROPRIATE.

Respondent makes two principal points in its Brief in Opposition to Petition for Writ of Certiorari. First, respondent correctly notes that because of the new rule bar of Teague v. Lane, 489 U.S. 288 (1989), the question squarely presented in this case cannot be resolved in federal habeas proceedings. (Brief in Opposition at 4-5, 6.)

As Justice Kennedy has noted, this point actually counsels in favor of a grant of certiorari. When resolution of an important question in federal court is barred by the new rule doctrine of Teague v. Lane, 489 U.S. 288 -- as respondent concedes here -- it is appropriate and necessary to grant certiorari in a case presenting that issue on direct review. Spencer v. Georgia, 500 U.S. 960, 961 (1991). Respondent's observation that the state court's resolution of this case "will not create any problem on federal habeas corpus" ignores this basic point.

Alternatively, respondent discusses the merits of the issue, concluding that the decision reached by the lower court plurality "passes constitutional scrutiny by this Court." (Brief in Opposition at 7-14.) Respondent's zeal to discuss the merits of the Double Jeopardy issue is misplaced.

Respondent does not dispute that this Court has repeatedly noted that the constitutional question presented in this case remains unresolved. See, e.g., Caspari v. Bohlen, 510 U.S. 383, 397 (1994); Lockhart v. Nelson, 488 U.S. 33, 37-38, n.6 (1988). Respondent does not dispute that, as this Court itself noted in Caspari, federal and state courts have "reached conflicting holdings on the issue." 510 U.S. at 395. Nor does respondent dispute that the Court has on one occasion already voted to grant certiorari to resolve this stark split, only to be unable to do so because of a Teague bar. Caspari v. Bohlen, 510 U.S. 383.

This is the perfect case to resolve the split of authority on this issue. The case comes to the Court on direct review. The issue was squarely presented to the state courts. Both the plurality and the dissenting opinions below reflect the stark split of authority throughout the country as to whether Double Jeopardy may apply in the context of formal trials on non-

capital enhancements. Moreover, the issue itself is a recurring one which presents itself in every jurisdiction in the country.¹

The question of whether Double Jeopardy permits the state repeated chances to prove a non-capital enhancement should not depend on the fortuity of where the case is tried.

Certiorari is appropriate to resolve this issue once and for all. See Hunt v. New York, ___ U.S. ___, 112 S.Ct. 432 (1991).

DATED: 12/19/97

Respectfully submitted,

GARDNER & DERHAM
CLIFF GARDNER


By Cliff Gardner
Attorney for Petitioner

¹ To its credit, respondent recognizes that the sufficiency issue was fully briefed and properly presented in the state court of appeal, albeit by way of a request for briefing by the state appellate court. Brief in Opposition at 3. Indeed, respondent attaches a copy of the brief filed on this issue with the state court of appeal. Brief in Opposition, Appendix C.

In that brief, respondent conceded that as to the prior conviction alleged as the basis for the enhancement, "there is nothing in the record which proves appellant personally inflicted great bodily injury . . . and or used a deadly or dangerous weapon" Brief in Opposition, Appendix C at 2. Given this concession, both the state supreme court and the state court of appeal agreed that under state law, the state had presented insufficient evidence to prove the enhancement. People v. Monge, Slip. Op. at 3-4; Brief in Opposition, Appendix D at 4.

CERTIFICATE OF SERVICE

I, Suzanne Ryan am over 18 years of age. My business address is Ghirardelli Square, Suite 220, 900 North Point, San Francisco, California, 94109. I am not a party to this action.

On December 19, 1997, I served the within

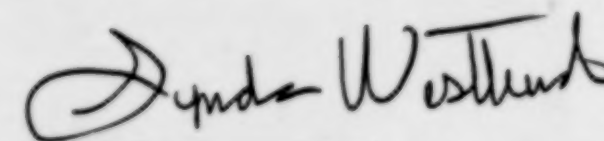
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upon the party named below by depositing a true copy in a United States mailbox in San Francisco, California, in a sealed envelope, postage prepaid, and addressed as follows:

Carl Henry, Esq.
Deputy Attorney General
Office of the Attorney General
300 South Spring Street
North Tower - 5th Floor
Los Angeles, CA 90013

I declare under penalty of perjury that the foregoing is true.

Executed on December 19, 1997, in San Francisco, California.


Linda Westlund